No. 06-8273

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

[Filed Jun. 6, 2007]

STEPHEN DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

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JOINT APPENDIX

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Petition for Writ of Certiorari Filed: December 6, 2006
Certiorari Granted Limited to Question 1: May 21, 2007

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Procedural History – Submitted in Lieu of the Docket Listings Pursuant to Sup. Ct. Rule 26(1) and 26(2)

August 28, 1995	Complaint filed in Hennepin County District Court, file number 9507-4990, charging petitioner Stephen Danforth with one count of first-degree criminal sexual conduct, Minn. Stat. § § 609.342, subd. 1(a), 2 (1994); 609.101, subd. 2 (1994); 609.346 (1994).
Feb. 7 – March 6, 1996	July trial held, the Honorable Richard Solum presiding. Petitioner found guilty of the single count against him.
May 13, 1996	The district court sentenced petitioner to 216 months in prison, an upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines.
August 8, 1996	The State filed a notice of appeal and informal brief challenging petitioner's sentence.
August 9, 1996	Petitioner filed a notice of appeal and a motion to consolidate the appeals.
December 16, 1997	The Minnesota Court of Appeals affirmed petitioner's conviction, reversed his sentence, and remanded for resentencing. *State v. Danforth*, File Nos. C8-96-1637, C0-96-1650, 573 N.W.2d 369 (Minn. Ct. App. 1997), *rev. denied* (Minn. Feb. 19, 1998).

	On remand, the district court resentenced petitioner to 316 months in prison, a double upward durational departure from the presumptive sentence.
May 4, 1999	The Minnesota Court of Appeals affirmed petitioner's sentence. *State v. Danforth,* File No. C5-98-2054, 1999 WL 262143 (Minn. Ct. App. 1999),
July 28, 1999	The Minnesota Supreme Court denied petitioner's petition for review.
August 23, 2004	Petitioner filed a petition for post-conviction relief challenging his conviction under *Crawford v. Washington* and his sentence under *Blakely v. Washington.*
September 24, 2004	The Honorable Marilyn Brown Rosenbaum denied the petition.
July 26, 2005	The Minnesota Court of Appeals affirmed. *Danforth v. State*, 700 N.W.2d 530 (Minn. Ct. App. 2005).
October 18, 2005	The Minnesota Supreme Court granted petitioner's pro se petition for further review "on the *Crawford* issue only." The Court requested that the Office of the State Public Defender (OSPD) represent petitioner.
October 26, 2005	The OSPD filed a notice of appearance on behalf of petitioner and a motion for extension of time in

	which to file petitioner's brief. The motion was subsequently granted.
July 27, 2006	The Minnesota Supreme Court affirmed. *Danforth v. State*, 718 N.W.2d 451 (Minn. 2006).
December 6, 2006	Petitioner filed a petition for writ of certiorari.
May 21, 2007	The United States Supreme Court granted the petition for writ of certiorari, limited to Question One presented in the petition.

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-96-1637
CO-96-1650

State of Minnesota,
Appellant (C8-96-1637),
Respondent (C0-96-1650),

vs.

Stephen (NMN) Danforth,
Respondent (C8-96-1637),
Appellant (C0-96-1650).

Filed December 16, 1997
Affirmed in part, reversed in part, and remanded
Harten, Judge

Hennepin County District Court
File No. 95074990

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Considered and decided by Huspeni, Presiding Judge, Klaphake, Judge, and Harten, Judge.

SYLLABUS

1. Contact in the parties' absence between the trial judge and a deliberating jury to avoid potential imminent disorder among the jury is left to the sound discretion of the district court and, absent prejudice, is not grounds for reversal.

2. The district court lawfully admitted into evidence the videotaped interview of the child victim of a sex crime after properly declaring the child incompetent to testify at trial under Minn. Stat. § 595.02, subd. 3 (1996).

3. The district court did not abuse its discretion by refusing to instruct the jury that it had found the child victim incompetent to testify.

4. Notwithstanding Minn. Stat. § 609.1352, subd. 1(b) (1996), in implementing the patterned sex offender sentencing provisions of section 609.1352, the sentencing court must impose and execute a sentence of at least double the presumptive guidelines sentence (but not more than the statutory maximum sentence) if the court finds that the defendant meets the criteria in subdivision 1(a) of that statute.

OPINION

HARTEN, Judge

Stephen Danforth was convicted of first-degree criminal sexual conduct for sexually abusing J.S., a six-year-old boy. Danforth appealed his conviction and the state appealed the sentence; the appeals were consolidated.

Danforth asserts that irregularities during jury deliberations deprived him of a fair trial. Danforth also argues that the district court erred in admitting a videotaped interview of J.S., after finding J.S. incompetent to testify at trial, because the videotape constituted hearsay that violated his right to confrontation. Finally, Danforth claims that the district court erred in failing to instruct the jury that J.S. had been found

incompetent to testify and by disallowing the parties to mention that finding.

The state argues that the district court erred by departing from statutory mandates in implementing Minn. Stat. § 609.1352 (1996) in that it failed to sentence Danforth to an executed term of imprisonment of not less than double the presumptive sentence.

We affirm Danforth's conviction, but reverse in part and remand for resentencing in accordance with Minn. Stat. § 609.1352 and this opinion.

FACTS

Danforth is a multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's. Danforth and J.S.' parents, particularly J.S.' father, were close friends for many years; Danforth was like a "favorite uncle" to J.S. and his siblings, having spent a great deal of time with the family.

On August 11, 1995, a neighbor discovered six-year-old J.S. with his pants down atop a younger girl, acting in a sexual manner. When confronted by his mother and asked where he had learned such things, J.S. said that "Steve" had put his mouth on J.S.' "pee-pee" and his finger in J.S.' "poopie butt." That evening, J.S.' mother called the police to report the alleged sexual abuse.

When interviewed by the police, J.S. said that "Steve" had put his "pee" in his buttocks and that "Steve" had made him "kiss his pee." On August 23, 1995, J.S. was interviewed at CornerHouse, a non-profit sexual abuse center. J.S. gave substantially similar information during this videotaped interview and clearly indicated that he had been sexually abused by Danforth. Danforth was then arrested and charged with first-degree criminal sexual conduct.

The trial was lengthy, lasting from February 7 through March 6, 1996. Danforth, a disbarred attorney, represented himself for much of the trial, although he had access to stand-by counsel.

On the day that testimony was scheduled to begin, a competency hearing was held to determine whether J.S. and his five-year-old sister, A.S., were competent to testify. Danforth strongly urged the district court to find J.S. incompetent and to rule the CornerHouse videotape inadmissible. The state agreed that J.S. appeared incompetent to testify, but argued that the videotape was nevertheless admissible. Because J.S. had limited ability to focus on questions and give relevant answers, the district court declared him incompetent. The district court found A.S. competent to testify, however, because she exhibited a far superior ability to concentrate than J.S.

The district court admitted the videotape because it found that the taped conversations bore sufficient indicia of reliability. Among other factors, the district court noted that J.S.' remarks appeared spontaneous and largely unsolicited by leading questions, and that J.S. lacked any apparent motivation to fabricate the accusation.

At trial, the jury viewed the CornerHouse videotape, and A.S. testified that she had seen "Steve" put his mouth on J.S.' "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. A.S. did not identify Danforth in the courtroom, however. The state called former victims to testify about the sexual abuse underlying some of Danforth's previous convictions.

Danforth testified on his own behalf He claimed that J.S.' parents trumped up the charges because J.S.' father was repulsed by Danforth's admitted homosexuality and J.S.' mother was angry with Danforth for various disparaging comments and criticism of her parenting skills. Danforth also

claimed that he was reformed and understood the evil of his past ways.

The jury convicted Danforth of first-degree criminal sexual conduct. The district court denied Danforth's detailed motion for a new trial and sentenced him to an executed term of imprisonment of 216 months, an upward durational departure of 58 months, but less than double the presumptive sentence, which the state asserted was the minimum sentence required under Minn. Stat. § 609.1352 (the patterned sex offender statute).

ISSUES

1. Did irregularities in the jury deliberation process deprive Danforth of a fair trial?

2. Did the district court err in admitting the CornerHouse videotape?

3. Did the district court err by refusing to instruct the jury that J.S. had been found incompetent to testify and by prohibiting the parties from mentioning that finding to the jury?

4. Did the district court err in implementing Danforth's sentence as a patterned sex offender under Minn. Stat. § 609.1352?

ANALYSIS

1. Jury deliberation process.

a. Judge's contact with jury.

Danforth argues that the district court committed reversible error by addressing the jury outside his and counsels' presence and in forcing the jury to deliberate until they reached a verdict.

Contact between the judge and jury without notice to the parties is generally considered error, but will be grounds for reversal only if appellant shows that the contact was prejudi-

cial. *State v. Kelley*, 517 N.W.2d 905, 908 (Minn. 1994). Contact between the judge and jury on matters not substantively relating to the case (such as matters relating to physical comfort and the like), however, is not necessarily error and is left to the sound discretion of the district court. *Id.* at 908-09.

Only hours into jury deliberations, following weeks of trial, juror L sent a note to the district court, complaining about the lack of air flow in the jury room and claiming that the jury was "hopelessly deadlocked." Despite the juror's premature conclusion that the jury was deadlocked, the district court gave the note serious attention and called the parties to the courtroom to discuss what response should be given. The parties, including Danforth, agreed that one of the jury instructions should be reread to the jury and that they should be sent back for further deliberations.

Later that same day, the bailiff informed the district court that tensions in the jury room were running high and that he believed violence could be imminent. The bailiff also said that one of the jurors, juror H, was threatening to leave. Because it had taken over 45 minutes to convene the parties following juror L's note, the district court spoke with juror H and then the entire jury without first notifying counsel or Danforth.

The district court's remarks to juror H and the rest of the jury were on the record and were limited to matters necessary to enable the jury to continue deliberating. Far from coercing the jury to deliberate until they reached a verdict, the district court attempted to correct some jurors' misimpression that they Were not allowed to become a hung jury and reassured them that it was only asking them to deliberate until the next day. The district court's remarks were merely a *request* for cooperation, diligence, and goodwill and an assurance that the jurors were still free to do as they wished.

In Kelley, the Minnesota Supreme Court cited the A.B.A. Standard Relating to Trial by Jury 15-4.4(b) (i986) with approval:

> "If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."
>
> The commentary to Standard 15-4.4(b) states that:
>
> [A] court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged. * * * [A] jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unable to agree.
>
> Instead, the real question is whether the jury was required to deliberate an unreasonable length of time or for unreasonable intervals, or was threatened with the prospect of such unreasonably lengthy deliberations. The general rule is that the length of time a jury may be kept deliberating is a matter within the discretion of the trial judge, but abuse of that discretion requires reversal. The reasonableness of the deliberation period depends on such factors as the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement.

Kelley, 517 N.W.2d at 909. We conclude that under the circumstances the district court did not abuse its discretion by encouraging the jury to work together for a few more hours to try to reach a verdict.

Danforth takes exception to his not being informed until the next morning of the rising tensions and the measures taken to diffuse them. Although it might have been more prudent to notify counsel and Danforth immediately of the further difficulties, the situation needed direct attention, and the parties probably could not have been reassembled quickly enough to avert substantial upset to the process.[1] Furthermore, Danforth shows no apparent prejudice from not being informed of the situation until morning; the jury went to dinner after meeting with the judge and did not continue its deliberations until the next morning.

We conclude that the district court's handling of the volatile situation was within its discretion and commendable under the circumstances.

b. Atmosphere of violence.

Danforth claims that an atmosphere of violence so pervaded the jury deliberation process that some jurors were coerced into their verdict. Although the bailiff warned the judge of the situation because he felt that violence could erupt, the bailiff appears to have been taking reasonable precautionary measures to ensure that the situation was contained before it got out of hand. The record indicates that many jurors felt strongly about the case and that tempers were short, but it does not support Danforth's contention that juror H actually threatened other jurors with violence.

Immediately after receiving the verdict, the district court asked each juror whether the tensions during deliberations influenced their verdict, and all jurors indicated that they had not been unduly influenced. Although the level of tension among jurors was less than ideal, there is no evidence that it rose to a level that prejudiced Danforth.

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[1] In his pro se reply brief at 7, Danforth himself recognizes that it 'is very probably in this case * * * that but for the trial judge's intervention, * * * or [H] would have made good on his threat to leave the jury."

c. Jury's review of audiotape not admitted into evidence.

By agreement of the parties, a transcript (instead of the audiotape) of police interrogation of Danforth was admitted at trial with certain portions relating to possible abuse of A.S. redacted. During deliberations, however, the jury inadvertently listened briefly to the audiotape before realizing that they were not supposed to have the tape.[2]

After this inadvertence was brought to his attention, the district court inquired of counsel and the parties what to do. The parties together crafted a curative instruction to be read to the jury, which Danforth and his counsel both specifically agreed would be adequate. Only later, *after* the jury announced its guilty Verdict, did Danforth request a mistrial based on the jury's exposure to the redacted statements. Accordingly, Danforth waived his right to seek reversal based on any prejudice that might have been caused by the jury's accidental exposure to the audiotape. *See State v. Fields*, 529 N.W.2d 353, 356-57 (Minn. App. 1995) (defendant's failure to move for mistrial before verdict precluded him from raising claim that incident in courtroom involving victim's father warranted new trial), *review denied* (Minn. Apr. 27, 1995); *State v. Yant*, 376 N.W.2d 487, 490-91 (Minn. App. 1985) (defendant waived right to object to sleeping jurors, where he was apprised of matter during trial and elected not to move for mistrial or request alternate seating before verdict), *review denied* (Minn. Jan. 17, 1986).

Nevertheless, to address the possibility of prejudice, the district court wisely conducted a *Schwartz* hearing after the verdict, and each of the jurors stated that listening to the audiotape had no impact upon his or her verdict.

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[2] The jury apparently heard the following redacted statements: Investigator: Okay. Okay, how about [A.S.]? [A.S] also during the interview said that there had been some inappropriate touching of her sexual - on her genitals, her sexual area. Danforth: Oh, no, no, no, no, never, not for either of them.

In sum, we find no abuse of discretion or prejudicial error in the district court's handling of the irregularities in the jury deliberation process.

2. Admission of CornerHouse videotape.

Appellate courts largely defer to the district court's exercise of discretion in evidentiary matters and will pot lightly overturn a district court's evidentiary ruling. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). If the admission of evidence violated a constitutional right, however, a new trial is required unless the state can show beyond a reasonable doubt that the error was harmless. *State v. Scott*, 501 N.W.2d 608, 619 (Minn. 1993).

The district court admitted the CornerHouse videotape in accordance with Minn. Stat. § 595.02, subd. 3:

> An out-of-court statement made by a child under the age of ten years * * * alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child * * * not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child * * * either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; and
>
> (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the

> proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

In addition, the Minnesota Supreme Court has held that recorded interviews of child sexual abuse victims must be shown to bear the "particularized guarantees of trustworthiness" required under *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). *Scott*, 501 N.W.2d at 616. This requirement is essentially incorporated in subdivision 3(a) of Minn. Stat. § 595.02, but the supreme court has listed various nonexclusive factors that bear on the reliability of the hearsay statements, including: spontaneity and consistent repetition, mental state of declarant, use of terminology unexpected of a child of a similar age, lack of motive to fabricate, suggestiveness of prior questioning or leading questions during interview, preconceptions during the interview of what the child should say, and whether the statements are the type of statements one would expect a child of that age to fabricate. *Scott*, 501 N.W.2d at 617 (citing *Idaho v. Wright*, 497 U.S. at 821, 110 S. Ct. at 3150 and *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990)).

Given J.S.' strong and substantially consistent statements regarding the abuse, his attention-deficit problems (which render him relatively impervious to suggestion and coaching), his apparent lack of motive to fabricate an allegation harming an avuncular figure, and the professionalism of the CornerHouse interview, we agree with the district court that the videotape was sufficiently reliable to be admitted into evidence.

We further conclude that there was sufficient corroborating evidence to admit the videotape, as required under Minn. Stat.

§ 595.02, subd. 3(b)(ii). A.S. had previously stated that she had seen Danforth sexually abuse J.S. The fact that A.S. did not identify Danforth at trial does not negate all corroborating value of her statements. There are many possible explanations why A.S. might not have been able to identify Danforth in the courtroom. Aside from the facts that Danforth had lost weight and it had been a long time in a child's timeframe since she had last seen him, the record suggests that A.S. simply may have been confused by the courtroom identification process.

Danforth also argues that the videotape's admission is particularly objectionable because the district court erred in finding J.S. incompetent to testify at trial. But Danforth strongly urged the district court to find J.S. incompetent to testify, thereby waiving his right to challenge the incompetency ruling on appeal. *Yant*, 376 N.W.2d at 490-91. Here, as in *Yant*, "the trial judge was eminently fair, and looked to the attorneys for some direction." *Id.* at 491. Danforth made a tactical trial decision to urge a finding of incompetence, possibly hoping that both J.S.' testimony and the videotape would be excluded. But both were not excluded, and Danforth now must live with that.

Danforth finally argues that the incompetency finding rendered the CornerHouse videotape unworthy of belief. Far from finding J.S. untruthful and lacking the ability to remember anything relevant to the allegations, the district court thoughtfully opined that J.S. had an ability to know and remember the truth, but that J.S. was not capable of paying attention long enough to communicate meaningfully to the jury in a trial setting. We conclude that Danforth's argument is without merit.

3. Finding of incompetency withheld from jury.

Danforth argues that the district court deprived him of the right to present a complete defense by refusing to instruct the jury that it had found J.S. incompetent to testify and prohibit-

ing either party from mentioning that finding to the jury. The jury was simply informed that J.S. was "unavailable" to testify.

The district court had discretion in fashioning an appropriate response to both parties' requests for a jury instruction regarding the incompetency finding. *See State v. O'Hagan*, 474 N.W.2d 613, 620 (Minn. App. 1991) ("Refusal to give a proposed jury instruction lies within the discretion of the trial court and there is no error absent an abuse of discretion."), *review denied* (Minn. Sept. 25, 1991).

The district court understood that its finding of incompetency did not necessarily mean that J.S.' testimony was incredible. The district court was concerned that instructing the jury that it had found J.S. incompetent might mislead the jury or cause the jury to conclude that J.S. was too frightened by Danforth to testify. And the jury could interpret such an instruction to reflect the district court's opinion of J.S.' credibility. The district court decided simply to instruct the jury that J.S. was unavailable and to prohibit the parties from mentioning the incompetency finding.[3] We cannot say that such a decision was an abuse of discretion.

4. Sentencing Danforth as "patterned sex offender."

The state argues that because the district court found that Danforth met the requisite three prongs to be sentenced as a patterned sex offender under Minn. Stat. § 609.1352, subd. 1(a), the district court was obliged to impose a sentence of at least double the presumptive sentence. Minn. Stat. § 609.1352, subd. 1, provides:

> Sentencing authority. (a) A court shall[4] commit a person to the commissioner of corrections for a period of time that is

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[3] Danforth nevertheless mentioned the incompetency finding in the presence of the jury in one of his questions during cross-examination of a witness.

[4] The legislature replaced may with shall in 1992.

not less than double the presumptive sentence under the sentencing guidelines and not more than the statutory maximum * * * if:

(1) the court is imposing an executed sentence, based on a sentencing guidelines presumptive imprisonment sentence or a dispositional departure for aggravating circumstances or a mandatory minimum sentence, on a person convicted of committing or attempting to commit a violation of section 609.342 * * *;

(2) the court finds that the offender is a danger to public safety; and

(3) the court finds that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. The finding must be based on a professional assessment by an examiner experienced in evaluating sex offenders that concludes that the offender is a patterned sex offender. The assessment must contain the facts upon which the conclusion is based, with reference to the offense history of the offender or the severity of the current offense, the social history of the offender, and the results of an examination of the offender's mental status unless the offender refuses to be examined. The conclusion may not be based on testing alone. A patterned sex offender is one whose criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term controls.

(b) The court shall consider imposing a sentence under this section whenever a person is convicted of violating section 609.342 or 609.343.

(Footnote added).

The district court believed that even if it found all three prongs necessary to sentence Danforth as a patterned sex

offender under subdivision 1(a), it still had discretion whether to impose the "not less than double the presumptive sentence" required by the statute. The statute states in plain language, however, that a court *shall* sentence a defendant to not less than double the presumptive sentence *if* the court finds that the three patterned sex offender prongs are met. Thus, a court does not have the discretion to withhold imposition of a double departure (but not more than the statutory maximum) once it finds that the three prongs have been met.

Subdivision 1(b) states that the court "shall consider" imposing the enhanced sentence for patterned sex offenders whenever a person is convicted under section 609.342 or 609.343. Because sections 609.342 and 609.343 (first-and second-degree criminal sexual conduct) are the most serious levels of sexual offenses, these offenses are singled out in subdivision 1(b) to require courts to *consider* imposing the enhanced sentence under the statute whenever a person is convicted of one of these crimes, even on a first offense. The other crimes listed in the statute are either lesser sexual crimes or other "predatory crimes" that do not necessarily involve sexual motivation. Thus, in harmonizing any purported conflict between subdivision 1(b) and subdivision 1(a), we conclude that subdivision 1(b) does not negate the mandatory nature of the sentencing provisions under subdivision 1(a) provided the court finds that the three patterned sex offender prongs have been met.

When a person is convicted under section 609.342 or 609.343, the court must consider whether the three prongs under Minn. Stat. § 609.1352, subd. 1(a), are met. If it decides that they are met, it must impose not less than double the presumptive sentence for the crime, not to exceed in any case the statutory maximum.[5] The court must then also

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[5] Minn. Stat. § 609.1352, subd. 4, which states that a "sentence imposed under subdivision 1 is a departure from the sentencing guidelines" gives no additional discretion to the district court in

impose a conditional release term of ten years or the remainder of the statutory maximum period, whichever is longer. Minn. Stat. § 609.1352, subd. 5. The court may not, however, impose the extended conditional release period under subdivision 5 without having invoked the enhanced sentencing provisions for patterned sex offenders under subdivision 1(a), as it did in this case. In other words, a court may not use subdivision 5 independently of subdivision 1(a).

We are particularly concerned with the district court's stated reliance on potential future civil commitment as a sexually dangerous person in sentencing Danforth. Because incapacitation alone is not a constitutionally permissible ground for civil commitment without a diagnosed mental disorder coupled With a legitimate attempt to treat it,[6] use of the civil commitment process is not to be anticipated or invited as a substitute for criminal incarceration to incapacitate chronic sex offenders.

Whenever a court sentences a defendant as a patterned sex offender, it has necessarily found that the defendant is a danger to public safety and needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. Minn. Stat. § 609.1352, subd. 1(a)(2), (3). The legislature has decided that anyone meeting such criteria warrants lengthy incarceration.

Accordingly, we reverse in part and remand for resentencing consistent with Minn. Stat. § 609.1352 and this opinion.

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sentencing as a patterned sex offender. It merely acknowledges that the enhanced sentences under subdivision 1 are guideline departures; it also eliminates possible arguments that the guidelines were still meant to control for the crimes underlying sentencing as a patterned sex offender and that additional Aggravating factors other than those implicit in a patterned sex offender finding are necessary for the enhanced sentence.

[6] See In re Blodgett, 510 N.W.2d 910 (Minn. 1994) (discussing constitutionality of psychopathic personality commitment statute).

We have painstakingly considered each of Danforth's numerous additional arguments presented in his pro se brief (some of which relate to the main claims addressed in this opinion) and find them to be without merit.

DECISION

Irregularities in the jury deliberation process did not deprive Danforth of a fair trial or involve district court abuse of discretion. The district court did not err in admitting a videotape interview of the victim or in refusing to instruct the jury or allow comment on the fact that the victim was found incompetent. The district court properly entered judgment convicting Danforth of first-degree criminal sexual conduct, but improperly applied Minn. Stat. § 609.1352 in sentencing, thereby requiring a remand for resentencing.

Affirmed in part, reversed in part, and remanded.

James C. Harten

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1998).

STATE OF MINNESOTA
IN COURT OF APPEALS

C5-98-2054

STATE OF MINNESOTA,
Respondent,

vs.

STEPHEN DANFORTH,
Appellant.

Filed May 4, 1999

Affirmed

Kalitowski, Judge
Hennepin County District Court
File No. 95074990

Mike Hatch, Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Amy Klobuchar, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

John M. Stuart, State Public Defender, Lyonel Norris, Assistant State Public Defender, 2829 University Avenue S.E., Suite 600, Minneapolis, MN 55414 (for appellant)

Considered and decided by Kalitowski, Presiding Judge, Klaphake, Judge, and Huspeni, Judge.[*]

UNPUBLISHEDOPINION

KALITOWSKI, Judge

Appellant Stephen Danforth contends the district court erred by: (1) denying his request for a continuance; and (2) denying his notice of removal of the sentencing judge. In his pro se brief, appellant raises several challenges to his sentencing. We affirm.

DECISION

I.

The decision to grant a continuance is vested in the sound discretion of the trial court. *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984). In determining whether the trial court soundly exercised its discretion, this court must

> examine the circumstances before the trial court when the motion was made to determine whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.

Id. To find reversible error, the court must find the error affected the outcome of the case. *State v. Jones*, 451 N.W.2d 55, 61 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990).

A sentencing hearing should be scheduled so that "the parties have adequate time to prepare and present arguments regarding the issue of sentencing." Minn. Stat. § 244.10, subd. 1 (1996). Due process requires that a defendant have notice, an opportunity to be heard, and an opportunity to confront and cross-examine witnesses at a sentencing hearing. *State v. Kortkamp*, 560 N.W.2d 93, 96 (Minn. App. 1997).

On May 27, 1998, the district court continued appellant's sentencing pending findings by the court psychologist, Dr. Lawrence Panciera, Ph.D., L.P., due to the court no later than June 19, 1998. Sentencing was rescheduled for August 4,

1998. The psychological report (Panciera Report) was dated July 1, 1998, and presumably was received by the court soon after. Appellant's counsel received the report July 21, but was unable to get it to appellant immediately due to a "lockdown" at the Stillwater Correctional Facility. Appellant requested a continuance on July 30, 1998, to secure more time to address the information in the report. On August 3, 1998, the court held a phone conference with the prosecutor and counsel for appellant on the matter, and the court refused to continue the sentencing. Sentencing was concluded the following day.

Appellant contends the district court erred because appellant had inadequate time to prepare to confront and cross-examine Dr. Panciera at the sentencing hearing and inadequate time to produce an expert to refute the Panciera Report. We disagree. The record indicates: (1) appellant and his counsel were aware that the psychological report was being compiled as of the May 27, 1998, court order; (2) appellant knew his psychological condition would be at issue; (3) appellant could have, but did not, hire his own expert prior to receiving the Panciera Report at any time between May 27 and July 21; (4) appellant had one to two weeks after receiving the Panciera Report to prepare for the hearing; and (5) appellant did not attempt to either examine or subpoena Dr. Panciera. We conclude appellant had ample opportunity to prepare to refute the Panciera Report and was not materially prejudiced because his continuance request was denied.

Appellant argues that because he did not receive the court's notice of its intent to sentence him as a patterned sex offender under Minn. Stat. § 609.1352 (1996), it was error for the court to apply that statute. We disagree. At appellant's original sentencing, the court found the patterned sex offender factors were present, but did not sentence according to the statute. On appeal, this court directed the district court to follow the sentencing scheme in the patterned sex offender statute. *See State v. Danforth*, 573 N.W.2d 369, 377 (Minn.

App. 1997), *review denied* (Minn. Feb. 19, 1998) (interpreting Minn. Stat. § 609.1352). Because that opinion was issued on December 16, 1997, appellant had notice in December 1997 that he would be sentenced as a patterned sex offender.

II.

Appellant argues the court erred in denying his motion for removal of the judge who presided at his sentencing. Whether a removal notice is proper is a question of law. *Citizens State Bank v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991). A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minnesota Pub.* Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Failure to honor a proper removal notice is reversible error requiring a new hearing. *Citizens State Bank*, 477 N.W.2d at 742 (stating rule in context of civil case).

A defendant may serve notice to remove a judge assigned to a hearing, but the defendant must serve and file that notice within seven days after receiving notice of which judge is to preside at the hearing, and not later than the commencement of the trial or hearing. Minn. R. Crim. P. 26.03, subd. 13(4). Notice to remove is not effective against a judge who has already presided at a trial, omnibus hearing, or other evidentiary hearing except upon a showing of cause. *Id.*

The district court notified the parties as to which judge would be presiding in this matter in a conference call on July 16, 1998. Appellant did not request removal until the hearing on August 4. Appellant argues the seven-day rule should not apply because he did not receive the Panciera Report until a week before the date set for resentencing, and he did not have an opportunity to discuss the matter with counsel until after the deadline for filing had passed. We disagree. The rule allowing removal does not provide exceptions or extensions

for events that occur after a judge is assigned. We conclude notice of removal was not timely, and the district court did not err by denying the removal request.

III.

Appellant argues he was not accorded his right of allocution at his sentencing hearing, and was therefore denied due process. We disagree. The right of allocution does not allow appellant to give "any information" before sentence, as appellant contends, but instead allows him only to give "any matter relevant to the question of sentence." Minn. R. Crim. P. 27.03, subd. 3. Because the district court gave appellant ample opportunity and instruction to focus his comments on the sentencing issues, we conclude the district court did not violate appellant's right of allocution by cutting short his statement.

IV.

Appellant argues the court improperly relied on the Panciera Report in his sentencing and that it was not timely filed. The trial court has discretion to determine what type of evaluations to admit into evidence. *Peterson v. Peterson*, 408 N.W.2d 901, 904 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). A trial judge is not bound by the same rules of evidence in sentencing as in the trial. *State v. Adams*, 295 N.W.2d 527, 535 (Minn. 1980).

For the court to sentence a defendant as a patterned sex offender, it must find that the defendant needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release. Minn. Stat. § 609.1352, subd. 1(a)(3). The finding must be based on a professional assessment, and the assessment

> must contain the facts upon which the conclusion is based, with reference to the offense history of the offender or the severity of the current offense, the social history of the

> offender, and the results of an examination of the offender's mental status unless the offender refuses to be examined.

Id. The statute continues:

> The conclusion may not be based on testing alone. A patterned sex offender is one whose criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term controls.

Id. (emphasis added).

Appellant refused to submit to testing or interviews for his professional assessment, so the court psychologist based his evaluation on records submitted to the court and on research in a previously implied psychological report. We conclude the district court did not err by relying on the Panciera Report because: (1) it was appropriate to look at information more than ten years old to determine whether appellant's criminal sexual behavior is "engrained"; (2) the report was proper even though Dr. Panciera compiled it without direct contact with appellant because the statute allows a defendant to be sentenced under the statute without a direct psychological screening. *See* Minn. Stat. § 609.1352, subd 1(a)(3) (stating assessment must contain results of examination of offender's mental status unless offender refuses to be examined); (3) the court did not err in allowing the report to rely on documents not in the court file, because the statute requires a broad look into a defendant's background. See Minn. Stat. § 609.115, subd. 1 (1996) (stating presentence investigation reports may be based on individual's "characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community"); and (4) appellant's hearsay concerns are unfounded, because the introduction of hearsay evidence at a sentencing hearing does not violate a

defendant's due process rights. *State v. Adams*, 295 N.W.2d 527, 536 (Minn. 1980).

Finally, we conclude the court did not err by allowing the Panciera Report to be filed after the court's deadline because the court has the discretion to set and extend nonstatutory deadlines. *See Housing & Redev. Auth. v. Kotlar*, 352 N.W.2d 497, 500 (Minn. App. 1984) (finding trial court within its discretion in setting deadline to produce documents and dismissing case when documents were not filed before deadline).

V.

Appellant argues the court erred by imposing a more severe sentence than that proposed in plea bargaii negotiations and imposed at his original sentencing. We disagree. The court is not limited to a sentence proposed by the state and declined by defendant. *State v. Ackerley*, 296 Minn. 495, 496, 207 N.W.2d 272, 273 (1973). Further, the state may appeal a defendant's sentence without offending double jeopare principles even though its success might deprive the defendant of the benefit of a more lenient sentence *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980). Also, if a defendant doe not have a crystallized expectation of finality in his or her sentence, there is no due process or double jeopardy bar to amending it. *State v. Humes*, 581 N.W.2d 317, 321 (Minn. 1998).

Here, the district court was instructed by this court to impose a double durational departure according t the patterned sex offender statute if certain findings were made. *See Danforth*, 573 N.W.2d at 377 (interpreting Minn. Stat. § 609.1352). The state appealed the original sentence within the prescribed tir period and appellant did not have a crystallized expectation in his sentence. We conclude the court did not err in increasing appellant's original sentence.

VI.

Appellant contends the court violated his due process rights by substituting a different judge for his sentencing hearing from the judge who presided at trial. We disagree. The judge who presided at appellant's trial retired and the substitute judge stated in the record that he was acquainted with the file and the remaining issues and that he was fully capable of going forward with the case. *Cf.* Minn. R. Crim. P. 26.03, subd. 13(1) (allowing substitution even during trial if judge is disabled from proceeding and substitute judge certifies familiarity with record).

VII.

Appellant argues the district court improperly penalized him for exercising his rights of freedom of speech and against self-incrimination. We disagree. Appellant chose not to cooperate with the evaluator for the psychological report. The court did not comment negatively on appellant's decision not to participate, and the report makes no negative inferences based on appellant's refusal to speak. Although the report may have benefited from appellant's participation, appellant was not punished for expressing his rights and his First and Fifth Amendment rights were not violated.

VIII.

Appellant contends the language in Minn. Stat. § 609.1352, subd. 1, is unconstitutionally vague. Appellant did not raise this argument at the district court so we decline to address it here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate courts only consider matters presented to and considered by district court).

IX.

Appellant argues the court cannot sentence him as a patterned sex offender because the state did not give notice until trial of its intent to pursue sentence enhancement under the statute. We disagree. The statute in question is a sentencing provision that neither affects the charges filed in a criminal complaint nor adds any elements of a crime. Therefore, the state was not required to notify appellant at the time of the original complaint that the prosecution would seek sentencing under the statute. *See State v. Christie*, 506 N.W.2d 293, 298 (Minn. 1993) (holding that patterned sex offender statute did not add elements of crime and did not create presumption of guilt, but only introduced factors that come into play after defendant has been found guilty of particular crime).

Affirmed.

(*) Retired judge of the Minnesota Court of Appeals, serving by apointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA
IN SUPREME COURT

C5-98-2054

State of Minnesota,
Respondent,

vs.

Stephen Danforth,
Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Stephen Danforth for further review be, and the same is, denied.

Dated: July 28, 1999

BY THE COURT:

/s/: Kathleen A. Blatz

Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

STEPHEN (NMN) DANFORTH,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum pursuant to Petitioner's Petition for Post-Conviction Relief and Motion for Correction of Sentence. After submissions by both parties, the Court took the matter under advisement on September 14, 2004.

Stephen Danforth, Petitioner, appears *pro se* and submitted memoranda and reply memoranda on his own behalf.

Amy E. Sweasy, Assistant County Attorney, submitted a memorandum on behalf of the State of Minnesota.

The Court, having reviewed the documents and files herein and being fully informed in the premises makes the following;

FINDINGS OF FACT

1. Petitioner is currently incarcerated in the State of Minnesota.

2. On March 6, 1996, Petitioner, after trial by jury, was found guilty by jury verdict of first degree criminal sexual conduct. On April 29, 1996, Petitioner was sentenced to an executed term of imprisonment of 216 months.

3. Petitioner appealed his conviction claiming: 1) irregularities during jury deliberations deprived him of a fair trial; 2) the Court erred in admitting the videotaped interview of J.S., after finding J.S. incompetent to testify at trial, because the videotape constituted hearsay that violated his right to confrontation; 3) the Court erred in failing to instruct the jury that J.S. had been found incompetent to testify and by disallowing the parties to mention that finding.

4. The State appealed the sentencing claiming the Court erred by departing from statutory mandates in implementing Minn. Stat. § 609.1352 (1996) because it failed to sentence Petitioner to an executed term of imprisonment of not More than double the presumptive sentence.

5. On December 16, 1997, the Minnesota Court of Appeals affirmed the conviction, but remanded the case for resentencing in accordance with Minn. Stat. § 609.1352. *State v. Danforth,* 573 N.W.2d 369 (Minn. Ct. App. 1997).

6. On remand, Petitioner was sentenced to an executed term of 316 months.

7. Petitioner appealed the resentencing contending that the Court erred by 1) denying his request for a continuance; and 2) denying his notice of removal of the sentencing judge.

8. On May 4, 1999, the Minnesota Court of Appeals affirmed the resentencing. *State v. Danforth*, No. C5-98-2054, 1999 In 262143 (Minn. Ct. App. 1999).

9. On September 9, 1999, Petitioner filed a Petition for Post-Conviction Relief pursuant to Minn. Stat. § 590.01 *et seq*. demanding a hearing and arguing that this Court should vacate and set aside his conviction and sentence or, in the alternative, grant a new trial.

10. In the Petition for Post Conviction Relief, Petitioner claimed: 1) new polygraph evidence should be admitted which requires acquittal or a new trial and appointment by the

Court of polygraphist, Darrell Shaw, as an expert for Petitioner, who is proceeding "in forma pauperis"; 2) the admission of the CornerHouse videotape prejudiced Petitioner and requires a new trial as it violated the confrontation clause; 3) the Trial Court did not conduct a "taint" hearing before allowing the two children to testify; 4) ineffective assistance of former pretrial counsel; 5) ex parte hearings hearings and conferences held by the Trial Court without the Petitioner's knowledge violated Petitioner's right to self representation; 6) issues surrounding preparation of the CornerHouse videotape deprived Petitioner of rights afforded by the confrontation clause; 7) testimony of witness Martinetti improperly bolstered the credibility of J.S.'s videotaped responses ("vouching claim"); 8) the Trial Court's refusal to allow discover of J.S's school records violated Petitioner's confrontation and due process rights; 9) admission of audiotape in which Petitioner invoked Miranda rights caused irremedial prejudice to Petitioner requiring a new trial; 10) the prosecution withheld evidence in violation of Minn.R.Civ.P. 7.01, the confrontation clause affecting Petitioner's right to present his defense, his right to a jury trial, and due process; 11) prosecutorial misconduct regarding Dr. Cotter ("discovery violation"); 12) prosecutorial misconduct regarding conversations with Juror Chiles; 13) Juror Hall's non-disclosure deprived Petitioner of his right to an impartial jury; 14) new evidence in Petitioner's 1995 phone bill requires a new trial; 15) failure of officers to keep notes and the prosecution's refusal to disclose notes of conversations with victims violated Petitioner's due process rights and right to confront witnesses; 16) closure of the courtroom during testimony of A.S., a child, deprived Petitioner of a public trial and due process; 17) improper contacts between the Court and jurors deprived Petitioner of his rights to a trial by jury and to a fair trial; 18) the Court's reliance on psychological report in resentencing was improper.

11. The Petition for Post-Conviction Relief was denied, and upon appeal, on December 5, 2000, the Minnesota Court of Appeals affirmed this Court's denial of post-conviction relief. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244 (Minn. Ct. App. 2000).

12. Petitioner now brings a Petition for Post-Conviction Relief based upon the decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), asserting that *Crawford* would have required a finding that the CornerHouse tape was' inadmissible evidence and that his conviction should be reversed.

13. Petitioner also brings a Motion for Correction of Sentence based upon the decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), asserting that *Blakely* invalidates the enhancement of his sentence beyond the presumptive range of the Minnesota Sentencing Guidelines.

14. Petitioner's appellate rights are exhausted and his case is not under direct review by any Courts.

15. At trial, the child victim was found incompetent to testify and therefore unavailable. A ComerHouse tape was presented to the jury pursuant to Minn. Stat. § 595.02, subd. 3.

16. By the Notice of Motion and his Proposed Order, Petitioner has requested a hearing pursuant to Minn. Stat. § 590.04, and seeks relief including vacation of his conviction and resentencing, a new trial, or in the alternative, resentencing.

CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to Minn. Stat. §§ 590.01 et seq. and has promptly considered the issues.

2. Petitioner's request for a hearing should be denied because the Petition, files and records conclusively show that

Petitioner is deserving of no relief under either theory presented to the Court.

3. Petitioner's Petition for Post-Conviction Relief is denied. *Crawford v. Washington*, 124 S. Ct. 1354 (2004) is not retroactive.

4. *Crawford* announced a new rule of law not dictated by precedent at the time Petitioner's conviction became final in 1998. At that time, the rule of law derived from *Ohio v. Roberts*, 448 U.S. 56 (1980), which was overruled by *Crawford*. *Crawford*. created a new rule of law that applies only to pending cases and those on direct appeal at the time *Crawford* was decided. Minnesota Courts limit retroactive application to cases pending when a new rule of law is announced. *See O 'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). If a conviction is final at the time the new rule of law is announced, a defendant may not ordinarily avail himself or herself of the new rule. *See id., citing Teague v. Lane*, 489 U.S. 288, 310-11 (1989). A court's decision creates a new rule of law when the decision was not dictated by precedent existing at the time the defendant's conviction became final. *See id.*

5. Petitioner's Motion for Correction of Sentence is denied. The decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) is not retroactive. This Court adopts the reasoning as set forth in paragraph 4 above. *See also Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004).

ORDER

1. The Petition for Post-Conviction Relief is denied in all respects.

2. The Motionfor Correction of Sentence is denied.

Dated: Sept. 24 ,2004

/s/: Marilyn Brown Rosenbaum
Marilyn Brown Rosenbaum
Judge of District Court

STATE OF MINNESOTA
IN COURT OF APPEALS
A04-1993

STEPHEN DANFORTH, petitioner,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

Filed July 26, 2005
Affirmed

Forsberg, Judge *

Hennepin County District Court
File No. 95074990

Stephen Danforth, #147636, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se appellant)

Mike Hatch, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 551012134; and

Amy Klobuchar, Hennepin County Attorney, Michael K. Walz, Assistant Hennepin County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Forsberg, Judge.

SYLLABUS

Because the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), is not a watershed rule of criminal procedure that implicates the fairness and accuracy

of a criminal proceeding, the case does not apply retroactively.

OPINION

FORSBERG, Judge

Appellant moved for postconviction relief under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The district court denied his motion, and he appeals from that denial.

FACTS

At the trial of appellant Stephen Danforth in 1996, the jury was shown a videotaped interview of a child victim who had been ruled unavailable to testify and whom appellant had never had the opportunity to cross-examine. The jury found appellant guilty of first-degree criminal sexual conduct. His conviction became final[1] on July 28, 1999, when the supreme court denied review of this court's decision affirming appellant's sentence on remand. *State v. Danforth*, No. C5-98-2054 (Minn. App. May 4, 1999), *review denied* (Minn. July 28, 1999).

In 2004, the Supreme Court released *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004) (holding that testimonial hearsay is inadmissible unless declarant is unavailable and defendant had prior opportunity to cross-examine declarant). Appellant moved for postconviction relief on the ground that *Crawford* invalidates his conviction. The district court denied his motion, and he appeals.[2]

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[1] See *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (conviction is final when "judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

[2] Appellant also moved for resentencing on the ground that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), applies retroactively. The district court denied the motion. Because appellant's argument was

ISSUE

Does *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), apply retroactively?

ANALYSIS

This court reviews the issue of retroactive application de novo. *State v. Petschl*, 692 N.W. 2d 463, 470 (Minn. App. 2004) (citing *State v. Costello*, 646 N.W. 2d 204, 207 (Minn. 2002)), *review denied* (Minn. Jan. 20, 2005). The retroactive application of *Crawford* is a case of first impression in Minnesota.[3]

Retroactivity with regard to cases on collateral review is governed by *Teague v. Lane*, which sets forth two exceptions to the general principle that defendants whose convictions are final at the time a new rule of law is announced may not avail themselves of the new rule. 489 U.S. 288, 310-12, 109 S. Ct. 1060, 1075-76 (1989). The two exceptions are cases that place particular kinds of conduct beyond the proscriptive power of lawmaking authority and cases that set out "watershed" rules of criminal procedure. Id. at 311-12, 109 S. Ct. at 1075-76. Five of the six federal circuit courts that have considered the retroactive application of *Crawford* in light of Teague have held that *Crawford* does not apply retroactively: *Murillo v. Frank*, 402 F.3d 786, 789-90 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Mungo v.*

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explicitly rejected in State v. Petschl, 692 N.W.2d 463, 472 (Minn. App. 2004) (holding that Blakely "is not a watershed rule subject to retroactive application on collateral review"), review denied (Minn. Jan. 20, 2005),we affirm that denial.

[3] We note that, in light of Crawford, appellant was granted permission to move for reconsideration of the federal district court's determination that his Confrontation Clause rights were not violated by admitting at trial the videotaped interview of the child. See Danforth v. Crist, 2004 WL 1630830 (D. Minn. July 14, 2004), reconsideration granted in part by 2005 WL 1041491 *2 (D. Minn. Mar. 18, 2005). At filing time, federal action remains pending.

Duncan, 393 F.3d 327, 336 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1936 (2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 902 (2005). We find the analyses in these cases persuasive.

Murillo concluded "that Crawford establishes a new rule" but held that the rule was not "a fundamental rule essential to a fair and accurate trial." 402 F.3d 790. *Murillo* provided two reasons for that holding. First, *Crawford* gives defendants the right to insist on live testimony even when available hearsay is trustworthy and "is not an indispensable innocence-protecting decision" that would apply retroactively. *Id.* at 790-91. Second, a violation of the Confrontation Clause, unlike a violation of "a truly vital rule of criminal procedure, such as entitlement to counsel," is subject to a harmless-error analysis; therefore, "*Crawford* cannot have established the sort of indispensable doctrine that applies retroactively even to closed cases." *Id.* at 791.

Dorchy cited *Teague* for the proposition that "[u]nder most circumstances . . . newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review" and concluded simply that "*Teague* thus prohibits [the defendant] from availing himself of the new rule articulated in *Crawford*." *Dorchy*, 398 F.3d at 788.

Mungo noted that, because *Crawford* will bar both "unreliable" and "highly reliable testimonial out-of-court statements," it will both "improve . . . [and] impair the accuracy of the factfinding process." *Mungo*, 393 F.3d at 335-36. "Because *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule." *Id.* at 336.

Brown concluded that because *Crawford* "merely sets out new standards for the admission of certain kinds of hearsay" and because "Confrontation Clause violations are subject to

harmless error analysis and thus may be excused . . . [i]t would . . . be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process." *Brown*, 381 F.3d at 1226-27.

Finally, *Evans* found that *Crawford* would not apply retroactively because "the *Crawford* court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to Teague v. Lane 's non-retroactivity doctrine." *Evans*, 371 F.3d at 444; *see also Ferguson v. Roper*, 400 F.3d 635, 639 n.3 (8th Cir. 2005) (citing *Evans* for proposition that *Crawford* doctrine does not fall within *Teague* exceptions).

Only the ninth circuit, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), *amended by* 408 F.3d 1127 (9th Cir. 2005), has held that *Crawford* applies retroactively. We find this opinion unpersuasive, as did the seventh circuit, which stated:

> The three judges in *Bockting* wrote separately. [One judge] concluded that *Crawford* applies on collateral review because it did not change the law. [Another judge] concluded that *Crawford* did change the law, and changed it so dramatically that it established a "watershed rule" that applies retroactively. [A third judge] agreed . . . that *Crawford* changed the law but . . . saw [it] as an ordinary development in criminal procedure that like almost all other such changes applies prospectively.

Murillo, 402 F.3d at 789-90; *see also Ferguson*, 400 F.3d at 639 n.3 (citing *Hiracheta v. Attorney Gen. of Cal.*, 105 F. App. 937, 938 (9th Cir. 2004), for proposition that *Crawford* is not retroactive).

Thus, the weight of authority from the six circuits that have addressed the issue clearly supports the view that *Crawford* does not have a retroactive application.

DECISION

In light of holdings that Crawforddoes not apply retroactively from the second, sixth, seventh, eighth, and tenth circuits, we conclude that the district court correctly denied appellant's motion for postconviction relief.

Affirmed.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

STATE OF MINNESOTA
IN SUPREME COURT
Court of Appeals
A04-1993

STEPHEN DANFORTH, petitioner,
Appellant,

vs.

STATE OF MINNESOTA,
Respondent.

Filed: July 27, 2006
Office of Appellate Courts

SYLLABUS

1. As stated in *State v. Houston,* 702 N.W.2d 268, 270 (Minn. 2005), this court applies the framework of *Teague v. Lane,* 489 U.S. 288 (1989), when determining the extent of retroactive application of a decision of the United States Supreme Court announcing a rule of federal constitutional criminal procedure.

2. *Crawford v. Washington,* 541 U.S. 36 (2004), established a new rule of federal constitutional criminal procedure that is not within either exception to the general rule of *Teague.* Consequently, appellant, whose case was final at the time *Crawford* was decided, is not entitled to have *Crawford* applied retroactively to his case.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, G. Barry, Justice.

Stephen Danforth was convicted of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), on March 6, 1996. This conviction arose out of the sexual abuse of J.S., a 6-year-old boy. J.S. was found incompetent to testify at trial, but a videotaped interview of J.S. conducted at a non-profit center was admitted into evidence. On appeal, the court of appeals affirmed Danforth's conviction but remanded for resentencing. *State v. Danforth*, 573 [1] N.W.2d 369, 371 (Minn. App. 1997) *(Danforth I), rev. denied* (Minn. Feb. 19, 1998).[1] On remand, Danforth was sentenced to imprisonment for 316 months. The court of appeals affirmed this sentence on appeal. *State v. Danforth*, No. C5-98-2054, 1999 WL 262143, at *1 (Minn. App. May 4, 1999) *(Danforth II), rev. denied* (Minn. July 28, 1999). Alleging various trial errors, Danforth filed a petition for postconviction relief. The postconviction court denied the petition and the court of appeals affirmed. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244, at *1 (Minn. App. Dec. 5, 2000) *(Danforth III), rev. denied* (Mimi. Feb. 13, 2001).

After the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),and *Blakely v. Washington*, 542 U.S. 296 (2004), Danforth filed a second petition for postconviction relief alleging he was entitled to relief based on the rules established by those cases. The postconviction court denied Danforth relief, finding that neither *Crawford* nor *Blakely* applied retroactively to Danforth's case; the court of appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005) *(Danforth IV)*. We granted review of the *Crawford* issue only and requested that the Office of the State Public Defender represent Danforth on this appeal.

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[1] *Danforth I* provides a full statement of the facts of this case. *See* 573 N.W.2d at 371-72.

Danforth argues that this court is free to apply a broader retroactivity standard than that of *Teague v. Lane*, 489 U.S. 288 (1989), and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles. He also argues that, even using the framework of *Teague*, *Crawford* should be retroactively applied to his case. We reaffirm our holding in *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005), that we are required to apply *Teague's* principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure. Because we conclude that, under *Teague*, *Crawford* does not apply retroactively to Danforth's case, we affirm.

I.

We recently held that the retroactivity principles of *Teague* control when determining the retroactive effect of a federal constitutional rule of criminal procedure.[2] *Houston*, 702 N.W.2d at 270. Under *Teague*, a new rule is usually not retroactively applicable to a defendant's case once the defendant's case has become final. *Teague*, 489 U.S. at 310 (plurality opinion).[3] It is undisputed that Danforth's case was final before *Crawford* was decided.[4]

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[2] The parties do not dispute that the rule in *Crawford* is one of federal constitutional procedure, and *Crawford* states as much. *See* 541 U.S. at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.").

[3] While *Teague's* retroactivity analysis originally received only a plurality, it soon became the majority approach and continues to be cited by the Supreme Court. *See Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (adopting *Teague* analysis as majority approach), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Beard v. Banks*, 542 U.S. 406, 408 (2004) (applying *Teague*).

[4] "A case is final when a 'judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been filed and] finally denied." *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (alterations in the original) (quoting *Griffith v. Kentucky*, 479 U.S. 314,

For the first time in his brief to this court, Danforth argues that this court is free to apply a broader retroactivity standard than that in *Teague* and that he is entitled to the benefit of *Crawford* under stateretroactivity principles. We choose to address this issue in the interests of justice.

We have stated that, when dealing with a new rule of federal constitutional criminal procedure, we are "compelled to follow the lead of the Supreme Court in determining when a decision is to be afforded retroactive treatment." *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). This conclusion is based on *American Trucking Associations, Inc. v. Smith*, in which a plurality of the Supreme Court stated that the retroactive effect of its federal constitutional decisions is a question of federal law and that the Court has "consistently required that state courts adhere to [the Court's] retroactivity decisions." 496 U.S. 167, 177-78 (1990) (plurality opinion); *see also*

Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 918 (1990). In *Houston*, we applied *O'Meara's* principles to hold that we *must* follow the *Teague* framework when determining whether a postconviction petitioner is entitled to have a new rule of federal constitutional criminal procedure applied retroactively to his or her case. *Houston*, *702* N.W.2d at 270. Minnesota is not the only state to have determined that a *Teague* analysis is required when determining whether a new rule of federal constitutional criminal procedure can be applied retroactively to cases on state postconviction review. *See Page v. Palmateer*, 84 P.3d 133, 134-38 (Or. 2004).

Danforth argues that *Teague* dictates the limits of retroactive application of new rules only in *federal* habeas corpus proceedings and does not limit the retroactive application of new rules in *state* postconviction proceedings. Danforth is incorrect when he asserts that state courts are free to give a Su-

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321 n.6 (1987)).

preme Court decision of federal constitutional criminal procedurebroader retroactive application than that given by the Supreme Court. In *American Trucking Associations*, the plurality rested its retroactivity analysis in part on *Michigan v. Payne*, 412 U.S. 47 (1973). *Am. Trucking Ass'ns, Inc.*, 496 U.S. at 178. In *Payne*, the Court reversed the decision of the Michigan Supreme Court, which had applied *North Carolina v. Pearce*, 395 U.S. 711 (1969), retroactively to Payne's case, and held that *Pearce* would not apply to errors occurring before *Pearce* was decided. *Payne*, 412 U.S. 49, 57.

In light of *Payne* and *American Trucking Associations*, we cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles. While the Supreme Court has not explicitly addressed retroactivity principles instatepostconvictionproceedings, the Court has drawn a line between cases that are "pending on direct review," and cases that are "final." *See Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still *pending on direct review. As to convictions that are already final*, however, the rule applies only in limited circumstances." (citation omitted) (emphasis added)). Once a case is "final," a new rule of federal constitutional criminal procedure can be retroactively applied to the case only if retroactive application is warranted under the *Teague* framework. *Schriro*, 542 U.S. at 351-52. The Court, therefore, has created a retroactivity framework with only two procedural categories of cases: (1) those on direct review and (2) those that are final. Since we have already concluded that a petition for postconviction relief does not constitute "direct review," *see Houston*, 702 N.W.2d at 270, and it is undisputed that Danforth's case was final at the time of the *Crawford* decision, we must apply *Teague* when determining whether *Crawford* can be retroactively applied to Danforth's case.

We are aware that other states have declined to apply *Teague* or have emphasized that they apply *Teague* as a matter of choice when determining the retroactivity of new rules of federal constitutional criminal procedure in state postconviction proceedings. *See Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992); *State v. Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 (Nev. 2002); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990). The principal rationales given in these decisions are: (1) a state may give a new rule of federal constitutional criminal procedure greater retroactive effect than that given by the Supreme Court and (2) state postconviction proceedings involve different interests than federal habeas proceedings. *See Whitfield*, 107 S.W.3d at 267-68; *Colwell*, 59 P.3d at 470-71; *Cowell*, 458 N.W.2d at 517-18. *Teague's* framework is based, in part, on concerns unique to federal habeas corpus decisions. *See Teague*, 489 U.S. at 308 ("KW]e have recognized that interests of *comity* and finality must also be considered in determining the proper scope of habeas review." (emphasis added)). Notwithstanding these different policy concerns, in light of *Payne*, *American Trucking Associations*, and the dichotomy drawn by *Teague* between cases on "direct review" and "final" cases, we reaffirm our decision in *Houston and* conclude that we are not free to fashion our own standard of retroactivity for *Crawford*. Therefore, the retroactivity of *Crawford* to Danforth's case must be analyzed under *Teague*.

II.

Danforth argues that, even using a *Teague* analysis, *Crawford* applies retroactively to his case because: (1) *Crawford* did not announce a "new" rule and, alternatively, (2) *Crawford* established a "watershed rule" of criminal procedure and therefore is fully retroactive under an exception to *Teague's* general rule. Whether *Crawford* applies retroac-

tively to cases final at the time *Crawford* was decided is a purely legal issue reviewed de novo. *See Houston,* 702 N.W.2d at 270. We address each of Danforth's arguments in turn.

A.

Under *Teague,* we inquire "whether the rule of federal constitutional criminal procedure is new, or whether it is merely a predictable extension of a pre-existing doctrine." *Houston,* 702 N.W.2d at 270. If the rule is "new," it generally will not be applicable to cases that became final before the rule was announced. *Teague,* 489 U.S. at 310. Danforth argues that *Crawford* did not announce a new rule of constitutional procedure but that Crawford'sdecision was "dictated by precedent dating back to the 1800s." The state, citing the decisions of several federal circuit courts on this issue, argues that holding that *Crawford* established a new rule is the better-reasoned position.

Crawford's "holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not *dictated* by precedent existing at the time the defendant's conviction became final." *See Graham v. Collins,* 506 U.S. 461, 467 (1993) (quoting *Teague,* 489 U.S. at 301). *Teague's* limit on the retroactivity of new rules of constitutional procedure "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar,* 494 U.S. 407, 414 (1990). As we have stated, the test to determine whether a rule of procedure is "new" for *Teague* purposes is not whether the rule "is logically an extension of some precedent," but rather "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor." *Houston,* 702 N.W.2d at 271 (quoting *Graham,* 506 U.S. at 467) (emphasis added) (internal quotation omitted)).

This test is meant "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith,* 497 U.S. 227, 234 (1990).

Applying these principles to this case,we examine the change *Crawford* worked on the legal landscape. As we have stated, prior to *Crawford,* the admissibility of an out-of-court statement under the Confrontation Clause was guided by *Ohio v. Roberts,* 448 U.S. 56 (1980), *abrogated by Crawford,* 541 U.S. 36. *See State v. Bobadilla,* 709 N.W.2d 243, 248 (Minn. 2006). Under *Roberts,* a hearsay statement could be admitted without violating a defendant's rights under the Confrontation Clause if: (1) the declarant was unavailable at trial and(2) the statement bore "adequate indicia of reliability." 448 U.S. at 66. Sufficient reliability was inferred when the evidence fell "within a firmly rooted hearsay exception." *Id.* If the evidence did not fall within such an exception, it was only admissible upon "a showing of particularized guarantees of trustworthiness." *Id.*

Crawford "significantly altered the rules governing the admissibility of testimonial out-of-court statements against criminal defendants at trial." *Wright,* 701 N.W.2d at 808. Stating that the *Roberts* test had a "demonstrated capacity" to admit statements in contravention of the Confrontation Clause, the Supreme Court held that "testimonial" evidence is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Crawford,* 541 U.S. at 53-54, 63, 68. The Court declined to provide a complete definition of "testimonial," but stated that the term covered, "at a minimum, * * prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and * * police interrogations." *Id.* at 68.

The rule in *Crawford,* therefore,was not compelled by *Roberts—Crawford* replaced the more flexible reliability inquiry of *Roberts* with a bright-line rule for a certain class of

hearsay statements. Nonetheless, Danforth argues that *Crawford* did not announce a new rule because "the Supreme Court has always held that testimonial statements made without cross-examination were inadmissible under the Confrontation Clause." This argument rests on the fact that *Crawford* based its rule on the "Framers' understanding" of the Confrontation Clause, *see* 541 U.S. at 59, 68, and the Court's statement that "the results of our Kprior] decisions have generally been faithful to the original meaning of the Confrontation Clause," *id.* at 60.

Danforth's argument is flawed because it misconstrues the test governing whether a rule is new for *Teague* purposes. We do not ask whether *Crawford's* rule is faithful to the original meaning of the Confrontation Clause or whether the results of relevant Supreme Court precedent are consistent with the rule in *Crawford.* Instead, we ask "whether reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* by existing precedent to rule in his favor.'" *Houston,* 702 N.W.2d at 271 (quoting *Graham,* 506 U.S. at 467 (emphasis added) (internal quotation omitted)). As noted earlier, prior to *Crawford, Roberts* guided a court's inquiry concerning whether the admission of an out-of-court statement violated the Confrontation Clause. *Bobadilla,* 709 N.W.2d at 248; *see also State v. King,* 622 N.W.2d 800, 807 (Minn. 2001). Put another way, Danforth's argument requires "reasonable jurists" to have foreseen *Crawford's significant* modification—if not outright overruling—of *Roberts.*[5] When conducting an analysis under *Teague,* the Supreme Court has never required such prescience of lower courts. Furthermore, such a requirement

[5] Danforth does not provide any examples of such "reasonable jurists." *Crawford* cited numerous lower court decisions (including the decisions of four federal circuits) which had recently applied *Roberts* to admit "plainly testimonial statements despite the absence of any opportunity to cross-examine." *See Crawford,* 541 U.S. at 64-65.

would not "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. Consequently, *Crawford* established a new rule of federal constitutional criminal procedure for the purposes of *Teague*.[6]

B.

There are two exceptions to *Teague's* general rule that new rules of federal constitutional criminal procedure are not retroactively applicable to cases that were final when that new rule was announced. *Teague*, 489 U.S. at 311. The first exception establishes that *Teague's* "bar does not apply to rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' *Beard v. Banks*, 542 U.S. 406, 416 (2004) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). The second exception, which is "known as the 'watershed rule' exception, applies when the new rule 'requires the observance of those procedures that * * are implicit in the concept of ordered liberty' or 'alter our understanding of the *bedrock procedural elements* that must

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[6] As noted by the state and court of appeals, this conclusion is in accordance with that of most federal circuits that have addressed this issue. Of the six circuits that have clearly addressed this issue, five have unquestionably held that *Crawford* established a new rule. *See Espy v. Massac*, 443 F.3d 1362, 1366 (11th Cir. 2006); *Lave v. Dretke*, 444 F.3d 333, 335 (5th Cir. 2006), *petition for cert. filed*, U.S.L.W. (U.S. June 13, 2005) (No. 05-11552); *Bintz v. Bertrand*, 403 F.3d 859, 865-67 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 174 (2005); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1226 (10th Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005). Even the Ninth Circuit, the only circuit thus far to hold that *Crawford* applies retroactively under *Teague*, held *Crawford* to be retroactive on the basis of one of the exceptions to *Teague's* general rule. *See Bockting v. Bayer*, 399 F.3d 1010, 1016, 1021 (9th Cir. 2005), *opinion amended on denial of panel reh'g*, 408 F.3d 1127 (9th Cir. 2005), *cert. granted sub nom. Wharton v. Bockting*, 126 S. Ct. 2017 (2006).

be found to vitiate the fairness of any particular conviction.' *Houston*, 702 N.W.2d at 270-71 (quoting *Teague*, 489 U.S. at 311). Danforth argues that, if *Crawford* established a new rule for *Teague* purposes, the rule is a "watershed rule" within *Teague's* second exception. The state argues, and the court of appeals held, that the rule established by *Crawford* does not fall within this narrow exception. *Danforth IV*, 700 N.W.2d at 531-32.

Since the Supreme Court adopted the *Teague* framework, it has yet to find a new rule of federal constitutional criminal procedure that qualifies as a "watershed rule." Such a rule "must be one without which 'the likelihood of an accurate conviction is seriously diminished.' *Houston*, 702 N.W.2d at 273 (quoting *Teague*, 489 U.S. at 313). A watershed rule must do more than simply improve the accuracy of a proceeding; it must be "essential to fundamental fairness of a proceeding." *Id.* The only rule that the Supreme Court has stated would fall within this exception is the right to trial counsel established by *Gideon v. Wainright*, 372 U.S. 335 (1963). *Beard*, 542 U.S. at 417. These rules are extremely rare, and the Supreme Court recently stated that it is unlikely any watershed rules have yet to be announced. *Schriro*, 542 U.S. at 352.

The rule announced in *Crawford* cannot meet the stringent requirements of this exception. First, *Crawford* imposed a bright line rule of exclusion for a certain class of hearsay statements based on the original intent of the Confrontation Clause. *See* 541 U.S. at 59, 68. Even when dealing with a fundamental right, the appropriate inquiry under *Teague* is not whether the new rule reflects the framers' intent, but whether jurisprudence under the "old rule" seriously diminished the accuracy of a criminal proceeding. *See Schriro*, 542 U.S. at 355-56. Given that, prior to Crawford,Confrontation Clause jurisprudence focused on the reliability of out-of-court statements, *see Roberts*, 448 U.S. at 66, the likelihood of

obtaining an accurate conviction is not seriously diminished in the absence of the rule established by *Crawford*. Indeed, the Supreme Court has indicated that some new rules of criminal procedure, though constitutionally based, may actually decrease the likelihood of an accurate determination of guilt or innocence. *See Butler*, 494 U.S. at 411, 416 (stating that a *violation* of the procedural rule in *Arizona v. Roberson*, 486 U.S. 675 (1988), may *increase* the likelihood of an accurate determination of guilt or innocence). The same argument could be made here, for while in some cases a *Crawford* violation would decrease the likelihood of an accurate determination of guilt or innocence (i.e., admitting an unreliable statement), in other cases statements admissible under the *Roberts* test but excluded under the *Crawford* test would be highly reliable and helpful to the jury's determination. While the additional protections of *Crawford* effectuate the original meaning of the Sixth Amendment, the absence of *Crawford's* bright line rule would not "seriously diminish the likelihood of obtaining an accurate determination" of innocence or guilt. *See Butler*, 494 U.S. at 416.

Similarly, the Supreme Court has also looked at pre-existing protections for defendants when examining whether a new procedural rule is an "absolute prerequisite to fundamental fairness' as required by *Teague's* second exception. *See Sawyer*, 497 U.S. at 243-44 (quoting *Teague*, 489 U.S. at 314). Given the pre-existing Confrontation Clause protections for defendants under *Roberts*, *Crawford's* rule is not "essential to the fundamental fairness of a proceeding." *Houston*, 702 N.W.2d at 273.

For all of the above reasons, the rule established by *Crawford* does not qualify as a "watershed rule" for the purposes of *Teague's* second exception.[7] Therefore, *Crawford*

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[7] Again, this is in accordance with the conclusion reached by most federal circuits that have addressed this issue. *See Espy*, 443 F.3d at 1367; *Lave*, 444 F.3d at 336; *Bintz*, 403 F.3d at 867; *Dorchy*, 398 F.3d at 788;

established a new rule of federal constitutional criminal procedure that is not within one of *Teague's* exceptions and, given that Danforth's case was final at the time of the *Crawford* decision, Danforth cannot receive the retroactive application of *Crawford* to his case.

Affirmed.

Mungo v. Duncan, 393 F.3d 327, 335-36 (2d Cir. 2004), *cert. denied*, 544 U.S. 1002 (2005); *Brown*, 381 F.3d at 1226-27. Only one circuit has held otherwise. *See Bockting*, 399 F.3d at 1021.